(31)

Supreme Court, U.S.
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No. 02-575

IN THE

Supreme Court of the United States

NIKE, INC., *et al.*,

Petitioners,

v.

MARC KASKY,

Respondent.

On Writ of Certiorari
to the Supreme Court of California

BRIEF FOR THE PETITIONERS

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QUESTIONS PRESENTED

1. When a corporation participates in a public debate – writing letters to newspaper editors and to educators and publishing communications addressed to the general public on issues of great political, social, and economic importance – may it be subjected to liability for factual inaccuracies on the theory that its statements are "commercial speech" because they might affect consumers' opinions about the business as a good corporate citizen and thereby affect their purchasing decisions?

2. Even assuming the California Supreme Court properly characterized such statements as "commercial speech," does the First Amendment, as applied to the states through the Fourteenth Amendment, permit subjecting speakers to the legal regime approved by that court in the decision below?

PARTIES TO THE PROCEEDINGS BELOW

In addition to the parties named in the caption, the following parties appeared below and are petitioners here: Philip Knight; Thomas Clarke; Mark Parker; and David Taylor.

RULE 29.6 STATEMENT

Petitioner Nike, Inc. has no parent corporation and no publicly held company owns 10% or more of the corporation's stock.

RULE 29.4(C) CERTIFICATION

Petitioner certifies that 28 U.S.C. 2403(b) may apply and that this Brief has been served upon the Attorney General of California.

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BRIEF FOR THE PETITIONERS

RELEVANT STATUTORY PROVISIONS

The relevant statutory provisions are reproduced at Pet. App. 83a-88a.

OPINIONS BELOW AND JURISDICTION

The opinion of the Supreme Court of California (Pet. App. 1a-64a) is published at 45 P.3d 243. The opinions and orders of the Court of Appeal and Superior Court (Pet. App. 66a-79a, 80a-81a) are unpublished. This Court has jurisdiction under 28 U.S.C. 1257(a).

STATEMENT OF THE CASE

This "private attorney general" action brought by respondent Marc Kasky against petitioner Nike asserts that petitioner violated California consumer protection statutes. Although Kasky disclaims any knowledge of the underlying facts, he asserts that Nike – in newspaper articles, letters to the editor, press releases, and correspondence – made false or misleading responses to publicly reported allegations regarding labor conditions at factories run by Nike contractors in Southeast Asia. Respondent invokes statutes that impose liability without requiring that Nike spoke with reckless disregard for the truth or purposefully lied. To the contrary, liability under the state Unfair Competition Law is "strict." The statutes also do not require, and Kasky does not allege, that anyone relied on any statement by Nike, much less that anyone has been, or was likely to be, injured as a result. The California Superior Court and California Court of Appeal held Kasky's claims barred by the First Amendment, but a sharply divided California Supreme Court reversed.

I. Introduction To The Controversy Over Working Conditions At Nike Contract Factories

Petitioner Nike, the world's leading athletic footwear, apparel, and equipment manufacturer, has for several years

been the principal focus of the passionate worldwide debate over "globalization" – *viz.*, the net impact of multinational investment on the developing world, the degree to which such investment should be regulated, and the pace at which it should occur. Nike's goods are produced by third parties under contract to Nike at approximately 900 factories in 51 countries with more than 600,000 employees. Beginning in 1995, Nike was the target of allegations that, at facilities in Southeast Asia, conditions were dangerous and workers were mistreated and underpaid. The upshot of these charges was not that Nike's products were themselves inferior, overpriced, or harmful, but rather that it was an immoral company, generating great profits on the backs of Third World labor. Those assertions quickly generated enormous media scrutiny and commentary, much of it pointed and vituperative, coupled with demands for legislative action and a broad effort to bring the heavy weight of moral opprobrium down on Nike and its employees.

Nike found itself responding on an immediate basis to assertions that, through its contract partners, it was operating sweatshops in supposedly slave-labor conditions. Although some news organizations concluded that some allegations against Nike had merit, former United Nations Ambassador Andrew Young concluded in an independent review commissioned by Nike that the charges were largely false. Nike then purchased "editorial advertisements" – *i.e.*, paid political advertisements (see *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 266 (1964) (affording such expression the full protection of the First Amendment)) – to report the results of that review. Nike officials also responded to the charges through press releases, letters to the editor and op-eds in newspapers around the country, and in letters to officers of national universities.

These various statements conveyed the view that Nike does act morally because its investments produce substantial economic and political benefits for workers and because it puts its best effort towards ensuring that employees at its

contract facilities are paid fairly and treated well. Although some of Nike's own statements noted that some consumers consider these ethical issues in making purchasing decisions, none of the statements at issue appeared in advertising of Nike's products or urged consumers to buy those products.

II. Relevant Provisions Of California Law

California's Unfair Competition Law ("UCL") (Cal. Bus. & Prof. Code 17200 et seq., *reproduced at* Pet. App. 83a-87a) prohibits, *inter alia*, "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising." Cal. Bus. & Prof. Code 17200 (2003). California broadly defines "advertising" to encompass essentially any statement relating to the speaker's products or services that is received in California, no matter where in the world it is published. *Id.* § 17500; Pet. App. 87a.

UCL suits may be brought by any California citizen in the role of "private attorney general." Cal. Bus. & Prof. Code 17204; Pet. App. 83a-84a. Liability is "strict" in that the defendant may be held liable even for literally true statements that a court later deems misleading; and such liability attaches notwithstanding the speaker's best efforts to ensure the statements' accuracy. *Cortez* v. *Purolator Air Filtration Prods. Co.*, 23 Cal. 4th 163 (Cal. 2000).

The California Supreme Court has long construed the UCL's capacious remedial provisions so as to "deter the defendant, and similar entities, from engaging in such practices in the future," stressing its commitment to "effectuate the full deterrent force" of the statute. *Fletcher* v. *Sec. Pac. Nat'l Bank*, 591 P.2d 51, 56-57 (Cal. 1979). A victorious UCL plaintiff may secure an injunction, including a command that the defendant engage in a court-supervised campaign of corrective speech. Cal. Bus. & Prof. Code 17203; Pet. App. 83a; see *Consumers Union* v. *Alta-Dena Certified Dairy*, 4 Cal. App. 4th 963, 972 (1992). The plaintiff may furthermore secure an "order for restitution" that may require the defendant to "return money obtained through

an unfair business practice to those persons in interest from whom the property was taken." Pet. App. 65a (quoting *Kraus* v. *Trinity Mgmt. Servs.*, 23 Cal. 4th 116, 127 (2000)).

The California Supreme Court has explicitly rejected, however, the argument that a court may require the defendant to provide restitution of "money 'which may have been acquired' through an unlawful practice" only when there is proof that individuals actually relied upon the defendant's misstatements. *Kraus*, 23 Cal. 4th at 134. Restitution may be awarded *without* "proof of deception, reliance, and injury." *Bank of the West* v. *Superior Ct.*, 2 Cal. 4th 1254, 1267 (1992). "This means that a violation, unlike common law fraud, can be shown even if no one was actually deceived, relied upon the fraudulent practice, or sustained any damage." *State Farm Fire & Cas. Co.* v. *Superior Ct.*, 45 Cal. App. 4th 1093, 1105 (1996).

The UCL encompasses every violation of California's False Advertising Law ("FAL") (Cal. Bus. & Prof. Code 17500 et seq., *reproduced at* Pet. App. 87a-88a). See Pet. App 83a. Like the UCL, the FAL applies to any "untrue or misleading" statement intended to result in the sale of products or services. Cal. Bus. & Prof. Code 17500. "A perfectly true statement couched in such a manner that it is likely to mislead or deceive the consumer, such as by failure to disclose other relevant information, is actionable under [the UCL and FAL]." *Day* v. *AT&T Corp.*, 63 Cal. App. 4th 325, 332-33 (1998). Also like the UCL suit, an FAL suit for injunctive relief and restitution may be brought by any citizen who chooses to appear as a "private attorney general." Cal. Bus. & Prof. Code 17535; Pet. App. 7a. But unlike the UCL, the FAL applies only to misstatements made negligently and carries criminal penalties. Cal. Bus. & Prof. Code 17500.

III. Respondent Kasky's Allegations

Respondent Kasky brought this suit under the UCL and FAL. See generally First Amended Complaint of Milberg,

Weiss, *et al.* for Marc Kasky versus Nike, Inc., *et al.* (July 2, 1998) [hereinafter Compl.].

1. Kasky, a "nominal plaintiff" (Pet. App. 66a), sued "on behalf of the General Public of the State of California" (Compl. ¶ 3). He disavows any personal knowledge of the facts he alleges, other than that he is a citizen of the State of California, which is his sole qualification to be the plaintiff. *Id.* ¶¶ 3, 8. He does not assert that he ever read any of the statements that he claims are unlawful, and he expressly "alleges no harm or damages whatsoever regarding himself individually." *Id.* ¶ 8. Kasky names as defendants Nike and five of its officers. (Because the principal defendant is Nike, we hereinafter use the collective "petitioner" or "Nike.").

The gravamen of Kasky's complaint is that, in 1996 and 1997, Nike responded to public allegations against it by making misstatements about working conditions at the Southeast Asian factories that manufacture certain Nike products. The complaint asserts, under the heading "Nike's Sweatshop Stigma," that the public's perception of Nike as a moral company "has come under attack in the past few years." Compl. ¶ 18. Kasky says "[t]he media have continued to expose" what he asserts are "NIKE's actual practices," citing reports by media outlets large ("*e.g.*, CBS NEWS, *Financial Times*, *The New York Times*, [and] *The San Francisco Chronicle*") and small ("*Greensboro North Carolina News and Record*, *Buffalo News* and *The Oregonian*"), "all of whom have run stories and articles which expose NIKE's actual practices." *Id.* ¶ 19. As Kasky later put it, "[t]he criticism of Nike's labor practices came from many quarters: network-television documentaries, columnists in national and local newspapers, consumer groups, labor unions, human-rights groups and nongovernmental organizations, church groups, Internet websites, college students and faculty, and demonstrators in the streets." Resp. Cal. S. Ct. Open. Br. 3. See also Compl. ¶ 54 (noting that Nike was the subject of a protest by "hundreds of persons [who] filled San Francisco's Union

Square"). The company has made misrepresentations, Kasky says, "in response to the public exposure of [its] labor policies and practices." *Id.* ¶ 18.

Kasky does not allege that Nike made a single false or misleading statement in a label on or an advertisement of a Nike product, nor that any of the statements in question even referred to any Nike product or to its qualities, such as price, suitability for a particular use, reliability, or effects on anyone's health or safety. Further, the counts of Kasky's complaint do not allege that Nike was anything more than negligent in making the statements he claims were false or misleading. Kasky alleges that "[t]he direct and proximate cause of defendants' misrepresentations was the negligence and carelessness of NIKE." Compl. ¶ 76. He pointedly alleges not that Nike misspoke purposefully or with reckless disregard *of the truth* but rather "with knowledge or with reckless disregard *of the laws of California* prohibiting false and misleading statements." Compl. ¶ 80 (emphasis added).[1]

2 The complaint follows a consistent pattern. It repeats an accusation that has been made publicly against Nike regarding conditions at a particular contract facility, identifies a statement by Nike that is arguably contrary to (or that explicitly denies) a similar allegation regarding conditions in Southeast Asia generally, and flatly asserts that the latter is false or misleading. A principal theory of the complaint is that Nike acted unlawfully by omission. "NIKE disclosed none of these facts to California consumers either in the promotion of its shoes or at the point of purchase, or in any other manner." Compl. ¶ 18.

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[1] The counts of the complaint do not advance the assertion, made once in the complaint's factual section, that Nike's statements regarding wage and hour issues were "intentionally and/or recklessly misleading and deceptive *and/or* were negligently made because they omit" allegations made against the company. Compl. ¶ 30 (emphasis added).

Kasky makes such allegations with respect to six classes of supposedly false or misleading statements:

• Kasky contends that Nike made unlawful "[c]laims that workers who make NIKE products are protected from and not subjected to corporal punishment and/or sexual abuse." Compl. ¶ 1(a). Kasky relies principally on a three-page document released by New Jersey businessman Thuyen Nguyen on behalf of "Vietnam Labor Watch," which calls on Nike to "cooperate with the Vietnam General Confederation of Labor" to address issues regarding factory conditions. *Id.* ¶ 18; *id.* App. 128. The author states that he "spoke to 35 workers" in reaching his conclusions. He reports that female workers "were forced to run around the factory's premise in the hot sun because they weren't wearing regulation shoes" and that "[o]ther forms of punishment used are forcing workers to stand in the sun (sun-drying), kneel on the floor with hands up in the air, write down their mistakes over and over again like parochial school children, clean the toilet and sweep factory floors." *Id.* App. 128-29. Further, female employees at the Vietnam plant "have complained about frequent sexual harassment from foreign supervisors." *Id.* (Mr. Nguyen's accusations became the basis for a month-long series of Doonesbury comic strips highly critical of Nike. Tim Shorrock, *Vietnam Protects its Labor Force; Foreign Investors Face Fines for Infractions*, J. of Commerce, July 7, 1997, at 1A.)

Kasky also points to U.S. media reports. A broadcast by the CBS program "48 Hours" on a Samyang, Vietnam factory noted that a Vietnamese newspaper had reported that a supervisor had hit fifteen women with a shoe for poor sewing and reported an allegation by an unnamed person that "45 women [were] disciplined, forced to kneel down and raise their hands in the sky for 25 minutes straight." Compl. App. 133, 134. An ESPN report also stated that at another factory in Vietnam "a producer saw a female supervisor slap a female worker on the arm" and a reporter "saw a supervisor angrily throw a shoe at a worker." Compl. ¶ 29.

Based on those allegations, Kasky alleges (Compl. ¶ 28) that three statements by Nike were false or misleading: In 1993, the Athletic Footwear Association (of which Nike is a member) adopted guidelines stating that its members "will only do business with partners whose workers are * * * not put at risk of physical harm." *Id.* App. 195. Nike itself adopted a Code of Conduct providing that its contractors must have "zero tolerance of corporal punishment or abuse, or of harassment of any kind." *Id.* App. 198. (Kasky omits that Nike acknowledges that "[c]ode violations can happen" and describes its policy to remedy those violations. *Id.*) And in 1996, Nike responded to "media attention" by issuing a "primer" stating that "Nike expatriates ensure safe working conditions and prevent illegal working conditions." *Id.* App. 203, 208.

• Kasky next contends that Nike made unlawful "[c]laims that NIKE products are made in accordance with applicable governmental laws and regulations governing wages and hours." Compl. ¶ 1(b). Kasky points to an October 1997 report by the "Hong Kong Christian Industrial Committee," a group challenging "political authoritarianism and repression of the workers' movement" and "repression of independent union organising" in China. Compl. ¶ 32; *id.* App. 98. The report addresses factories "in the special economic zone of the Pearl River Delta in Guandong Province in southern China" and is based on interviews during Spring 1997 "with 10 workers in" each of five factories, some of which produced Nike products. *Id.* App. 100. According to that report, the factory has required workers to work overtime in violation of China's Labor Law and "pregnant workers are treated with disrespect and have been, on occasion, unjustly terminated." Compl. ¶ 32.

Kasky also points to an Ernst & Young report on conditions in December 1996 at one of Nike's several hundred contract facilities – the Tae Kwang Vina Industrial Ltd. Co. plant in Bien Hoa City, Vietnam – which identified "48 cases where workers were required to work above the

maximum working hours" (although Kasky omits that workers are paid a "150% overtime rate"). Compl. App. 82. Finally, Kasky relies on the aforementioned Thuyen Nguyen document, which alleges based on Nguyen's interviews with thirty-five employees that it is the "norm" to require employees to work overtime. Compl. App. 129.

On the basis of those allegations, Kasky asserts that two statements by Nike are false or misleading: In June 1996, Nike wrote to various university officials – responding to "attack[s] from the Made in the USA Foundation, and other labor organizers" – stating that the Nike Code of Conduct and Memorandum of Understanding "bind[] its production subcontractors" to "compl[y] with applicable government regulations regarding minimum wage and overtime, as well as occupational health and safety, environmental regulations, worker insurance and equal opportunity." Compl. App. 190; see also *id.* App. 181.[2] Nike also wrote to an individual in Tilburg, Germany, stating that "Nike will demand that [a] subcontractor address" violations. *Id.* App. 187.

• Kasky contends that Nike made false or misleading "[c]laims that NIKE products are made in accordance with applicable laws and regulations governing health and safety conditions." Compl. ¶ 1(c). Kasky points to the Ernst & Young report, which stated that certain areas of one plant in Bein Hoa City, Vietnam, contained dangerous levels of toluene, acetone, and dust. *Id.* App. 88. ESPN also reported that female workers in Vietnam had been exposed to toluene. Compl. ¶ 45.

On this basis, Kasky claims that Nike made three false or misleading statements. First, it wrote to university officials that its Memorandum of Understanding requires subcontractors to comply with "applicable government regulations regarding occupational health & safety [and]

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[2] Kasky neglects to note the letter's explanation that, "given the vast area of our operations and the difficulty of policing such a network, some violations occur." Compl. App. 190-91.

environmental regulations." Compl. ¶ 39; *id.* App. 190. Second, Nike CEO Philip Knight said at a shareholders' meeting that, at new shoe factories, "you'll find air quality even in the rubber room is better than it is in Los Angeles." *Id.* App. 265. Third, a Nike official was quoted in an article in *The Oregonian* as responding to allegations of "the Transnational Resource and Action Center, a San Francisco-based activist group," by stating that the effort to require subcontractors to meet U.S. OSHA standards is "a work in progress." Compl. ¶ 44; *id.* App. 170-71.

• Kasky contends that Nike made false or misleading "[c]laims that NIKE pays average line-workers double-the-minimum wage in Southeast Asia" (Compl. ¶ 1(d)) and, relatedly, false or misleading "[c]laims that NIKE guarantees a 'living wage' for all workers who make NIKE products" (*id.* ¶ 1(g)). Kasky points to the conclusions of the Hong Kong Christian Industrial Committee regarding its interviews with ten workers at factories in Guangdong Province, China. Compl. ¶ 18; *id.* App. 98, 100. The committee states that employees work long hours without overtime pay and calls on Nike to require its contractors to pay a "living wage" that is "above the minimum wage as set" by law. *Id.* App. 115. Kasky also points to a letter by Nike stating that "our factories pay at least the locally-mandated minimum wage" and explaining that Nike "*cannot* ask our contractors to raise wages" to the level of a "living wage" as "generally defined as sufficient income to support the needs of a family of four" (*id.* App. 122-23 (emphasis added)) because so disproportionate a demand in the labor market would inevitably result in "driving us all out of business, and destroying jobs, in the process." *Id.* App. 123.

Based on those statements, including Nike's *own* statement that it cannot require subcontractors to pay a "living wage," Kasky alleges that Nike made a false or misleading statement when issuing a press release in Washington, D.C., that responded to allegations made at "a news conference by

San Francisco-based Global Exchange" and that referred to workers receiving a living wage. Compl. App. 322.

• Kasky next contends that Nike made false or misleading "[c]laims that workers who produce NIKE products receive free meals and health care." Compl. ¶ 1(e). Kasky points to Vietnam Labor Watch's translation of an article in the *Youth Newspaper* of Ho Chi Minh City, which urges readers to "request a Nike action packet" and explains that "the Dong Nai Confederation of Labor * * * will bring pressure to bear on Nike and its contractors." *Id.* App. 272-73. This article assertedly concludes that workers were required to pay for lunches. Compl. ¶ 53.

On this basis, Kasky claims that Nike made two false or misleading statements: First, Nike CEO Philip Knight wrote a letter to the editor of *The New York Times* responding to "Bob Herbert's June 10 and June 14 columns on Nike's operations in Asia." Compl. ¶ 52; *id.* App. 285. The letter states that workers in Nike contract facilities have received "free meals, housing and health care and transportation subsidies." *Id.* App. 285. Second, Nike released a document entitled "Nike Responds to Sweatshop Allegations" – which "respond[s] to claims made by Joel Joseph, chairman of the Made in the USA Foundation," an organization "largely financed by labor unions" – stating that "compensation [at subcontractor factories] extends beyond wages to include * * * free meals * * *." Compl. ¶ 52; *id.* App. 270.

• Kasky finally contends that Nike made false or misleading "[c]laims that the GoodWorks International (Andrew Young) report proves that NIKE is doing a good job and 'operating morally.'" Compl. ¶ 1(f). Kasky points to the fact that the report in question "did not address, directly or indirectly, wage, hour and overtime" issues, a point that Mr. Young himself made when the report was released. Compl. ¶¶ 58(a)-59(a); *id.* App. 289. Further, the report did not address the Ernst & Young report on the Tae Kwang Vina Industrial Ltd. Co. plant in Bien Hoa City, Vietnam. *Id.* ¶

58(b). Third, the report incorrectly identifies a researcher named Anita Chan as one of thirty-four experts with whom GoodWorks spoke. *Id.* ¶ 58(c). Finally, a Stephen Glass piece in *The New Republic* characterizes a photograph under the caption "Andrew Young meeting with plant management and union representatives" as "somewhat misleading" because, as Nike acknowledged, the individuals represented workers but were paid by the plant. *Id.* ¶ 60; *id.* App. 316.

On this basis, Kasky claims that Nike made two false or misleading statements: First, Nike "took out full-page advertisements in major U.S. newspapers (*New York Times*, *Washington Post*, *U.S.A. Today*, *San Francisco Chronicle*, etc.)" in which it quoted the following statement from the GoodWorks report: "Nike is doing a good job...*but Nike can and should do better*." Compl. ¶ 56; *id.* App. 307. (Kasky's complaint, *but not Nike's full-page paid editorial*, omits the second part of the sentence.) Second, CEO Philip Knight stated at the company's 1997 annual shareholders' meeting: "So I think we continue to make good progress, and I think that any independent party will find as Andrew Young [did] that we are operating morally." Compl. ¶ 57; *id.* App. 267.

3. As noted, the counts of Kasky's complaint do not allege that Nike made any of the foregoing statements with reckless disregard for the truth, much less that it purposefully lied or misled. Kasky also pointedly does not allege that any person – including any California resident – relied on any of these statements by Nike in purchasing any Nike product or was otherwise injured in any respect.

Nonetheless, Kasky seeks an injunction requiring Nike "to disgorge all monies which [it] acquired" by selling its products in California in violation of the UCL or the FAL. It would also be required "to undertake a Court-approved public information campaign to correct any NIKE statement and/or claim that th[e] Court" deems false or misleading. Nike also would be subject to a broad injunction barring it from "[m]isrepresenting the working conditions under which NIKE

products are made including, but not limited to, wages, hours, overtime, environmental, health and/or safety conditions, and the use of child labor to produce NIKE products." Kasky does not, however, assert that Nike continues to publish any of the statements he challenges and accordingly does not seek a cease and desist order.

He does demand, of course, that Nike be required to pay his "attorneys' fees and costs." Compl. ¶ 34.

IV. Proceedings Below

The Superior Court held Kasky's complaint barred by the First Amendment as applied by the Fourteenth and the Court of Appeal unanimously affirmed, but a sharply divided California Supreme Court reversed.

1. Petitioner moved to dismiss the complaint on First Amendment grounds. The Superior Court dismissed Kasky's complaint with prejudice and without leave to amend. Pet. App. 80a-81a.

2. The California Court of Appeal affirmed, holding that the statements at issue were fully protected, not commercial, speech. The court explained that "the case at bar lies in familiar First Amendment territory – public dialogue on a matter of public concern. Though drafted in terms of commercial speech, the complaint in fact seeks judicial intervention in a public debate." Pet. App. 75a. The case arose, the court explained, "in the context of a broader debate about the social implications of employing low-cost foreign labor for manufacturing functions once performed by domestic workers," a debate that "has given rise to urgent calls for action ranging from international labor standards to consumer boycotts." *Id.* 76a. Although Nike's statements could affect consumers' purchasing decisions, its speech "cross[es] the boundary between political and private decisionmaking. The citizen may want to translate personal discontent over Nike's labor practices into political action * * *." *Id.* 78a.

The speech that Kasky sought to punish was also distinguishable, the Court of Appeal explained, from representations on public matters that courts have previously deemed "commercial speech." This case does not "concern communications conveying information or representations about specific characteristics of goods," as when a trade association made claims about the effects on health of the cholesterol in eggs. Pet. App. 74a (citing *Nat'l Comm'n on Egg Nutrition* v. *FTC*, 570 F.2d 157 (CA7 1977)).

The Court of Appeal thus concluded that "the trial court properly sustained the defendants' demurrer without leave to amend." Pet. App. 79a. Kasky had made a "scattershot" attempt to argue that he could amend his complaint "to state a cause of action on some theory allowing content-related abridgement of noncommercial speech." *Id.*; Resp. C.A. Open. Br. 26. But Kasky did not assert that he could plead that Nike had acted with reckless or deliberate disregard for the truth or that he could plead that anyone had relied on Nike's statements, much less that anyone had been injured. The court accordingly saw "no reasonable possibility that [the complaint] could be amended to" satisfy the First Amendment. Pet. App. 79a.

3. Kasky sought discretionary review in the California Supreme Court on a single ground: that the Court of Appeal had erred in deeming Nike's statements fully protected, rather than commercial, speech. He thus did *not* pursue the argument that he could amend his complaint to satisfy the scrutiny applicable to fully protected speech. And once again, Kasky did not allege that Nike spoke with reckless or deliberate disregard for the truth or purposefully lied, or that Nike was even negligent, or that any person had relied on any Nike statement or been injured. According to respondent: "The only question under controlling law is whether Nike's false statements of fact about its own labor practices meet the test or definition of commercial speech." Resp. Pet. for Rev. 16. He framed the issue as "whether Nike's statements satisfy the applicable standards for determining that

expression is commercial speech," acknowledging that "[i]f they do not, then the ultimate issue is resolved in Nike's favor, and the statements are immune from state regulation." Resp. Cal. S. Ct. Open. Br. 1. The state supreme court granted review to decide whether Nike's "statements are commercial or noncommercial speech" (Pet. App. 1a), reasoning that "commercial speech that is false or misleading receives no protection under the First Amendment, and therefore a law that prohibits only such unprotected speech cannot violate constitutional free speech provisions" (*id.* 27a).

Dividing four-to-three, the court reinstated Kasky's complaint. The majority rejected Nike's argument that its statements were not "commercial speech" because they addressed matters of public importance, they made no reference to any product or qualities, and they were not in the form of advertisements. The majority held that each of those factors was irrelevant and that Nike's statements are "commercial speech" under a three-part test the majority found "consistent with, and implicit in, [this] Court's commercial speech decisions." Pet. App. 18a.

First, commercial speech is engaged in by a person or entity "engaged in commerce." Pet. App. 18a. Obviously, the majority explained, that is true of Nike. *Id.* 21a.

Second, the "intended audience [of commercial speech] is likely to be actual or potential buyers or customers of the speaker's goods or services, or persons acting for actual or potential buyers or customers, or persons (such as reporters or reviewers) likely to repeat the message to or otherwise influence actual or potential buyers or customers." Pet. App. 18a (emphasis omitted). But the sale of products need not be the "*only* purpose" of the speech, so that a statement "primarily intended to reach consumers and to influence them to buy the speaker's products is not exempt from the category of commercial speech because the speaker also has a secondary purpose to influence lenders, investors, or lawmakers." *Id.* 28a (emphasis in original). In this case,

Nike's letters to universities were made "directly to actual and potential purchasers," and Nike's "press releases and letters to newspaper editors, although addressed to the public generally, were *also* intended to reach and influence actual and potential purchasers of Nike products." *Id.* 21a (emphasis added).

Third, "the factual content of the message should be commercial in character" (Pet. App. 19a), which means "it is likely to influence consumers in their commercial decisions" (*id.* 28a). "[T]ypically," such speech "consists of representations of fact about the business operations, products, or services of the speaker * * * made for the purpose of promoting sales * * * or other commercial transactions." *Id.* 19a. These include "statements about the manner in which the products are manufactured, distributed or sold, about repair or warranty services that the seller provides to purchasers of the product, or about the identity or qualifications of persons who manufacture, distribute, sell, service or endorse the product," as well as "statements about the education, experience, and qualifications of the persons providing or endorsing the service." *Id.* In this case, "[i]n describing its own labor policies, and the practices and working conditions in factories where its products are made, Nike was making factual representations about its own business operations." *Id.* 22a. Further, "[f]or a significant segment of the buying public, labor practices do matter in making consumer choices." *Id.* 28a.

The majority believed that, because Nike is a commercial entity, its statements about its operations and those of its subcontractors were unlikely to be chilled by government regulation. But consistent with the statutory purpose to "deter" misstatements, the majority reasoned that, "[t]o the extent that application of these laws may make Nike more cautious, and cause it to make greater efforts to verify the truth of its statements, these laws will serve the purpose of commercial speech protection by 'insuring that the stream of commercial information flow[s] cleanly as well as freely.'"

Pet. App. 22a (quoting *Va. State Bd. of Pharmacy* v. *Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 772 (1976)).

4. Three justices dissented. They concluded that Nike's statements were fully protected as speech on an important public issue. "Nike's labor practices and policies, and in turn, its products, *were* the public issue." Pet. App. 37a (Chin, J.) (emphasis in original). As Justice Brown explained:

> Nike faced a sophisticated media campaign attacking its overseas labor practices. As a result, its labor practices were discussed on television news programs and in numerous newspapers and magazines. These discussions have even entered the political arena as various governments, government officials and organizations have proposed and passed resolutions condemning Nike's labor practices. Given these facts, Nike's overseas labor practices were undoubtedly a matter of public concern, and its speech on this issue was therefore "entitled to special protection."

Id. 55a-56a (quoting *Connick* v. *Myers*, 461 U.S. 138, 145 (1983)). In these circumstances, "Nike could hardly engage in a general discussion on overseas labor exploitation and economic globalization without discussing its own labor practices." *Id.* 43a (Chin, J.).

The majority's legal regime, the dissenters explained, chills speech on this important issue. "[T]he corporation [can] never be sure whether its truthful statements may deceive or confuse the public and would likely incur significant burden and expense in litigating the issue." Pet. App. 49a (Brown, J.). Further, the majority's ruling distorts the marketplace of ideas by discriminating against a particular viewpoint. "Under the majority's test, only speakers engaged in commerce are strictly liable for their false or misleading representations * * *. Meanwhile, other speakers who make the same representations may face no such liability, regardless of the context of their statements." *Id.*

"Handicapping one side in this important worldwide debate is both ill considered and unconstitutional. *Id.* 31a (Chin, J.).

Nor, the dissenters explained, could the majority's approach be sustained by analogy to regulations of commercial advertising and labeling. Nike's statements were not made in "product labels, inserts, packaging, or commercial advertising intended to reach only Nike's actual or potential customers." Pet. App. 34a (Chin, J.). Indeed, such restrictions on commercial speech had previously been sustained because businesses remained free to speak on all these public issues in other fora. "By contrast, Nike has *no* other avenue for defending its labor practices, given the breadth of" California's UCL and FAL. *Id.* 59a (Brown, J.).

5. This Court granted certiorari. 123 S. Ct. 817 (2003).

SUMMARY OF ARGUMENT

I. The California Supreme Court erred in holding that commercial speech encompasses everything said by anyone "engaged in commerce," to an "intended audience" of "potential * * * customers" or "persons (such as reporters * * *)" likely to influence actual or potential customers, that conveys factual information about the speaker "likely to influence consumers in their commercial decisions." Pet. App. 18a, 28a. Each of the three tests articulated by this Court for identifying "commercial speech" not only precludes the California court's holding but also establishes that petitioner's speech was fully protected. Petitioner's statements did not merely "propose a commercial transaction" (*United States* v. *United Foods, Inc.*, 533 U.S. 405, 409 (2001)), did not "relate[] solely to the economic interests of the speaker and its audience" (*Cent. Hudson Gas & Elec. Co.* v. *Pub. Serv. Comm'n*, 447 U.S. 557, 561 (1980)), and did not exhibit two of the three principal features that, when found in "combination," indicate that speech is "commercial": (1) advertising format; (2) explicit reference to a product; and (3) economic motivation (*Bolger* v. *Youngs Drug Prods. Corp.*, 463 U.S 60, 69 (1983)).

Nor can the commercial speech doctrine be extended so broadly as to sustain the California Supreme Court's ruling. In recognizing the category of "commercial speech," this Court did not carve out a segment of fully protected speech for lesser protection, but rather extended the First Amendment's ambit to encompass communication that otherwise would be regarded as within government's extensive authority to regulate commerce. Compare *Valentine* v. *Chrestensen*, 316 U.S. 52 (1942) with *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976). Although commercial speech is thus protected, this Court has concluded that it lacks the full communicative value of fully protected speech, through which speakers engage in a vigorous exchange of viewpoints. The decision below is nonetheless targeted at fully protected speech on matters of great public importance – typified by this dispute over labor conditions – for it is those issues that are likely to influence consumer choices. *Thornhill* v. *Alabama*, 310 U.S. 88, 102-03 (1940).

The California Supreme Court's ruling also omits a defining feature of commercial speech under this Court's precedents: the regulation of speech must have a direct nexus to government regulation of commerce. *Ohralik* v. *Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978). The California court's conclusion that government may regulate all statements of fact by commercial entities that could influence consumers sweeps far too broadly, for "[e]very expression of opinion on matters that are important has the potentiality of inducing action in the interests of one rather than another group in society." *Thornhill* v. *Alabama*, 310 U.S. at 104. Relatedly, California's regulation is principally concerned with moral judgments that only indirectly affect consumer behavior and thus does not seek to ameliorate "commercial harms" as required by this Court's precedents. *E.g.*, *City of Cincinnati* v. *Discovery Network*, 507 U.S. 410 (1993).

II. Even if petitioner's statements could be characterized as "commercial speech," the legal regime approved by the

California Supreme Court violates the First Amendment. The court plainly erred in holding that government has a free hand in adopting any regulatory scheme, however onerous, so long as it directly penalizes only false or misleading commercial speech. This Court has repeatedly held that imposing liability for speech on matters of public importance without fault or on a mere showing of negligence presents too great a risk of chilling fully protected expression. *E.g.*, *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 340 (1974). The California regime inevitably inhibits such speech, in no small part because it is calculated and applied by the courts of that state to "deter" misstatements, through such means as the elimination of any defense of good faith and any requirement, as a prerequisite to bringing suit and securing potentially crushing relief, that someone have been injured. A corporation's statements around the world in any forum are subject to the *Kasky* regime if received in California, and a commercial entity can have no confidence that those statements will later be deemed by a state court to be entirely truthful. Notably, the speech subject to prohibition and punishment under the decision below lacks either of the features – an essential contribution to the speaker's financial bottom-line and easy verification – that have led this Court to conclude that traditional advertising is not unduly chilled by government regulation.

This is accordingly an *a fortiori* case for the application of the prophylactic regime applied by this Court in contexts in which government seeks to regulate speech on matters of public concern. Liability may not be imposed without fault. Nor may relief be sought by a "private attorney general" – who has no personal knowledge of the truth of his allegations and has not been injured – on behalf of an indeterminate class of persons who have themselves suffered no harm. Government may not assume the role of arbiter of truth unless necessary to advance an important government interest, features that the California scheme lacks.

ARGUMENT

I. The Power California Asserts To Restrict Speech On Matters Of Public Importance, Untethered To Regulation Of Commercial Transactions, Finds No Refuge In This Court's Jurisprudence.

The California Supreme Court defined "commercial speech" to cover everything said by anyone "engaged in commerce," to an "intended audience" of "potential * * * customers" or "persons (such as reporters * * *)" likely to influence actual or potential customers that conveys factual information about itself "likely to influence consumers in their commercial decisions." Pet. App. 18a, 28a. It matters not in what *form* the speech appears – *i.e.*, on a product label, in an advertisement, or in a newspaper editorial. Nor does it matter whether the speech addresses the qualities of a product as such (like its price, availability, or suitability) or instead addresses only a burning social issue. Under California law as construed below, Nike's statements in *The New York Times* about labor conditions in its Southeast Asia factories have no more protection under the First Amendment than a supermarket flyer advertising Nike "Shox" shoes for $69.

Although the California court characterized that result as "consistent with" and "implicit in" this Court's decisions (*id.* 18a), it cannot be seriously argued that such a novel conception of commercial speech meets the criteria set out in this Court's precedents. See Part I-A, *infra*. Nor can those precedents be stretched to accommodate this ruling without abandoning all hope of cabining the commercial speech doctrine. See Part I-B, *infra*.[3]

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[3] Because the California decision extends beyond economic information that is essential to sales and that is easily verified, it lacks the "anti-freeze" that this Court has suggested prevents traditional commercial advertising from being chilled by government regulation. See Part II, *infra*.

A. This Court's Decisions Reject The California Supreme Court's Definition Of "Commercial Speech."

Having said over a decade ago that "*the test* for identifying commercial speech" is whether it proposes a commercial transaction (*Bd. of Trustees* v. *Fox*, 492 U.S. 469, 473-74 (1989) (emphasis added)), this Court has rendered several even more definitive rulings "usually defin[ing] [it] as speech that does *no more than* propose a commercial transaction" (*United States* v. *United Foods, Inc.*, 533 U.S. 405, 409 (2001) (emphasis added)). See also, *e.g.*, *Edenfield* v. *Fane*, 507 U.S. 761, 767 (1993). The California Supreme Court, by contrast, omitted any requirement that the speech make a commercial proposal at all, much less that it do so exclusively. The decision below thus flatly conflicts with this Court's precedents.

Nor does the California court's ruling accord with this Court's earlier characterization of commercial speech as "expression related solely to the economic interests of the speaker and its audience." *Cent. Hudson Gas & Elec. Co.* v. *Pub. Serv. Comm'n*, 447 U.S. 557, 561 (1980). To the contrary, the decision below implicates economic interests only secondarily; its principal concern is with consumers who purchase (or boycott) goods for *non*-economic reasons. And, beyond purchasing decisions altogether, readers sensitized to labor issues "may want to translate personal discontent over Nike's labor practices into political action" (Pet. App. 78a (Court of Appeal)), as Justice Brown recognized in citing press reports of Nike critics lobbying for measures restricting sales of its products (*id.* 55a-56a (dissent)). Nor was Nike's *own* motivation for speaking "solely" economic – except in the sense that virtually *everything* a company does is ultimately intended to improve its financial bottom line. Nike was also concerned by the prospect of government action restricting foreign investment or condemning the company,

and with reduced employee morale.[4] Yet the California court deemed it irrelevant that Nike's statements were "addressed to the public generally" (*id.* 21a) and sought to "influence lenders, investors, or lawmakers" (*id.* 28a).

The court pronounced its decision reconcilable with yet a third test for identifying commercial speech: *Bolger* v. *Youngs Drug Products Corp.*, 463 U.S 60 (1983), concluded that a pamphlet advertising condoms was commercial speech based on three factors in "combination": (1) advertising format; (2) explicit reference to a product; and (3) economic motivation. 463 U.S. at 66-67 & n.13. Despite the fact that the *Bolger* pamphlet was concededly an advertisement, the California Supreme Court deemed the format – and the forum – of a statement irrelevant. That cannot be right, for among the premises of the commercial speech doctrine is that an advertisement has less communicative value than a statement

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[4] *E.g.*, *March Down Fifth Avenue in New York City Protesting the Use of Child Labor Abroad to Make Products Which American Consumers Buy Relatively Cheap* (Nat'l Pub. Radio broadcast, Dec. 11, 1998) (linking proclamation by President Clinton urging "an end to sweatshop conditions both in the United States and abroad" to protests against Nike); Bernie Sanders, *Webwire – Nike Corporate Practices Come Under Attack*, Congressional Press Release, Oct. 24, 1997 (reporting on letter from 53 U.S. congressional representatives seeking meeting with Nike to address overseas labor issues and asserting that "Nike believes that workers in the United States are good enough to purchase [its] shoe products, but are no longer worthy enough to manufacture them"); Paula L. Green, *Nike, Jordan Challenged on Conditions Indonesian Worker in Court Battle*, J. of Commerce, July 25, 1996, at 3A (describing efforts to pressure Nike by, *e.g.*, an AFL-CIO youth group and Rev. Jesse Jackson, as well as attempts to link issue to "crusade" by U.S. Department of Labor to eliminate domestic sweatshops); Robin Bulman, Editorial, *Nike's Tainted Cash?*, J. of Commerce, July 23, 1996, at 7A (reporting on resolution of Portland Metropolitan Human Rights Commission urging local school board to decline Nike donation of $500,000 to cover budget shortfall on the basis of "alleged human rights abuses by the company's overseas suppliers").

with the same message contained in a newspaper editorial that plays a role in broader public discussion.

Just as important, the California court proceeded from a vastly overblown conception of "product references." The *Bolger* advertisement promoted purchases of the speaker's products to prevent disease by *referring* to those products both generically (as condoms) and specifically (by name). 463 U.S at 66-67 & n.13. An analogue in this case would be a traditional ad with the Nike logo touting running shoes. But in an Orwellian *ipse dixit*, the California Supreme Court held that "product references" require *no* reference to *any* product, instead encompassing every factual statement a business makes about its operations or the conditions in which employees supplying its firms work. Pet. App. 19a. Respondent's complaint, for example, does not assert that any statement by Nike about its products was false or misleading; nor do any of the statements complained of even refer to the characteristics (such as price, availability, or suitability) of Nike's products.

The decision below can therefore be sustained only if this Court adopts yet a *fourth* definition of "commercial speech" – one that dramatically expands the doctrine's scope. As petitioner now shows, such a new definition would conflict with basic First Amendment principles.

B. The Extension Of The Commercial Speech Doctrine Embraced Below Is Divorced From The Doctrine's Theoretical And Practical Underpinnings, Discriminates Based On Viewpoint, And Does Not Prevent Or Redress "Commercial Harms."

1. The California Supreme Court's Authoritative Construction Of The State's Statutes Targets Speech On Matters Of Public Concern Lying At The Core Of The First Amendment.

In expanding the commercial speech category beyond all previously accepted bounds, the California Supreme Court paid no serious heed to the underpinnings of the commercial speech doctrine, which *extended* the First Amendment's protective ambit a quarter of a century ago to expression that had for some time been deemed to fall within government's power to control commerce itself, and thus had received essentially no First Amendment protection at all. Government's relatively free-hand in regulating commercial activity ever since *Lochner*'s demise had been thought to extend not just to the speech that is itself a "component of that activity" (*Ohralik* v. *Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978)) – as when contractual offers are enforced – but also to speech that merely *promotes* or otherwise intrinsically *relates to* such activity. See, *e.g.*, *Valentine* v. *Chrestensen*, 316 U.S. 52 (1942). That leap was subject to a significant course correction in *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976), which extended First Amendment protection to "commercial speech," as typified by statements regarding "who is producing and selling what product, for what reason, and at what price."

This Court recognized in *Virginia State Board* and its progeny that "commercial speech" has constitutionally significant value *to listeners* and therefore merits protection

under the First Amendment. "Advertising, though entirely commercial, may often carry information of import to significant issues of the day." And commercial speech informs "the public of the availability, nature, and prices of products and services, and thus performs an indispensable role in the allocation of resources in a free enterprise system." *Bates* v. *State Bar of Ariz.*, 433 U.S. 350, 364 (1977) (citations omitted). But the Court has, thus far, declined to extend *full* First Amendment protection to commercial speech on the ground that, although it has substantial value for listeners, it has been thought to lack the communicative value of fully protected speech to the speaker and to society generally and in that sense has been said to make less of a "direct contribution to the interchange of ideas." *Va. Pharmacy Bd.*, 425 U.S. at 780. By contrast, through fully protected speech, individuals participate in the polity, expressing views and engaging in debate that collectively makes up the nation's social and political consciousness, triggering our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964). This Court has "frequently reaffirmed that speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Connick* v. *Myers*, 461 U.S. 138, 145 (1983) (citation omitted).

The California court's decision is irreconcilable with this Court's precedents because it subjects to suit, and exposes to potential prohibition and devastating financial sanctions, speech that contributes to public understanding of important social issues where the justification for governmental regulation is at a minimum because the context is "conducive to rational and considered decisionmaking" (*Edenfield*, 507 U.S. at 775) and bears only a tangential relation to commercial transactions. The ruling below deems statements on matters of public importance to be "commercial speech" whenever they involve the company's business practices and

might influence consumers who adhere to what the literature calls "ethical purchase behaviour," which posits that some consumers purchase products based not just on price and quality but also on their "*moral* judgment" about the *seller*. N. Craig Smith, *Morality and the Market* 177 (1990) (emphasis added).

That theory cuts the heart out of the First Amendment's protections for statements by commercial entities on nearly *every* public issue – from a company's diversity policy to its community relations efforts to its political activities – all of which can be said to "matter in making consumer choices" (Pet. App. 28a). The decision below thus swallows up public discussion of *all* "matter[s] of political, social, or other concern to the community," as distinguished from the narrow categories of "matters only of personal interest" (*Connick* v. *Myers*, 461 U.S. 138, 146-47 (1983)) and of "speech solely in the individual interest of the speaker and its specific business audience" (*Dun & Bradstreet, Inc.* v. *Greenmoss Builders, Inc.*, 472 U.S. 749, 762 (1985) (plurality)).

This case makes the point perfectly. Unlike a traditional false advertising complainant, Kasky does not claim that petitioner misled consumers into believing that Nike offers them a "better deal," that its products are better made, or even that they are "cooler" than the competition's. Rather, he claims that petitioner's labor practices in Southeast Asia raise so important a social issue that citizens make moral judgments on that basis about Nike, and that those judgments, in turn, influence their purchasing decisions.

But that simply shows why this case belongs at the very core of the First Amendment's protections: It presents a classic dispute between business and labor of the precise sort that this Court in *Thornhill* v. *Alabama*, 310 U.S. 88, 103 (1940), located squarely "within that area of free discussion that is guaranteed by the Constitution," reasoning that "labor relations are not matters of mere local or private concern," and that "[f]ree discussion concerning the conditions in

industry and the causes of labor disputes [is] indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society." *Id.* Debates in that arena inevitably produce "bitter and extreme charges, countercharges, unfounded rumors, vituperations, personal accusations, misrepresentations, and distortions." *Linn* v. *United Plant Guard Workers*, 383 U.S. 53, 58 (1966). If the full protections of the First Amendment apply to the allegations of Vietnam Labor Watch, the Hong Kong Christian Industrial Committee, and the Dong Nai Confederation of Labor underlying respondent's complaint, as well as to a widely publicized address of the President of the AFL-CIO claiming that a Nike contractor "pays workers as low as 16 cents an hour for 77- to 84-hour weeks and fires them if they refuse overtime" (*Big Labor Rips Nike at Big PR's Annual Outing*, O'Dwyer's PR Services Report, July 1998, at 1), and to Bob Herbert's columns asserting that "the cries of the oppressed * * * suit [Nike]" (*In America; Nike's Bad Neighborhood,* N.Y. Times, June 14, 1996, § A, at 29), so too they apply when Nike *responds* to those allegations.

The irony of the California Supreme Court's decision is palpable. A plaintiff like Kasky can bring suit on the basis of allegations that arise not from his or her personal knowledge but from press reports describing the public exchange of accusations against, and responses by, a company.[5] Under the

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[5] See Compl. ¶ 29 & App. 133-34 (CBS News); *id.* ¶ 45 & App. 170-71 (statement in *The Oregonian*); *id.* ¶ 52 & App. 285 (letter to editor of *The New York Times*); *id.* ¶ 56 & App. 307 (paid editorial on GoodWorks International report); *id.* ¶ 60 & App. 316 (*New Republic*); *id.* ¶ 29 (ESPN). See also, *e.g.*, Tunku Varadarajan, *Nike Audit Uncovers Health Hazards at Factory*, Times (London), Nov. 10, 1997; Danielle Knight, *Labor-Environment: Shoe Plant Called Unsafe for Workers*, Inter Press, Nov. 10, 1997; and *Nike Plant Conditions in Vietnam Hit in Audit*, Reuters, *reprinted in* Chicago Tribune, Nov. 10, 1997, at 12 (discussing Ernst & Young report); William Branigin, *Clinton, Garment Makers Hail Accord on Sweatshops; Critics Say Pact Falls Short on Key Work Issues*, Wash. Post, Apr. 15, 1997, § A, at A10; and *Nike Contractors Accused of Worker Abuse,* Assoc. Press, Mar. 29, 1997, at A49 (discussing allegations of Thuyen Nguyen); Nat Hentoff, Op-ed, *The Trouble With Role Models*, Wash. Post, Oct. 25, 1997, at A19; and Brad Knickerbocker, *Nike Fights Full-Court Press on Labor Issue*, Christian Science Monitor, Sept. 23, 1997, at 9 (discussing allegations of Hong Kong Christian Industrial Committee).

decision below, the more important the issue, the more likely it is to influence consumers and thus, perversely, the more likely it is that speech on the issue will give rise to liability.

To be sure, advertising does not receive the full protections of the First Amendment when it merely uses the *artifice* of "link[ing] a product to a current public debate." *Cent. Hudson Gas & Elec. Co.*, 447 U.S. at 563 n.5. See also, *e.g.*, *Zauderer* v. *Office of Disciplinary Counsel of Ohio Supreme Court*, 471 U.S. 626, 637 n.7 (1985). But, as this Court recognized in *Bolger*, the state's augmented power to regulate commercial speech coexists with the principle that speech on matters of public importance (including that by corporations) loses none of its protection by virtue of the fact that it may alter consumer behavior. 463 U.S at 86. Indeed, it is precisely *because* "[a] company has *the full panoply of constitutional protections* available to its *direct comments on public issues*, [that] there is no reason for providing similar constitutional protection when such comments are made in the context of commercial transactions." *Id.* at 68 (emphasis added). Thus, when a corporation's statements on public issues do not appear in "commercial speech" as defined by this Court's precedents – which petitioner's statements plainly do not under any of the three tests announced by the Court (see Part I-A, *supra*) – they are fully protected by the First Amendment.[6]

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[6] *Bolger* relied on two companion decisions authored by Justice Powell. *Central Hudson* held that a power company's *advertising* which discussed, and was designed to promote, electric power consumption was "commercial speech" notwithstanding that electricity consumption is an important public issue. 447 U.S. 557. *Consolidated Edison*, decided the same day, held that a pamphlet

2. The Application Of The California Statutes To Public Statements Unrelated To Advertisements And Representations Of Product Qualities Lacks The Required Nexus To A State Regulatory Scheme And Amounts To Impermissible Viewpoint Discrimination.

This Court has declined to extend the full protections of the First Amendment to commercial speech for the further reason that, because advertising does not ordinarily generate the intense media scrutiny and public discussion and reflection typically associated with editorials and other speech on social, political, and moral matters of public moment, direct government regulation may be the only mechanism to ensure that consumers receive accurate information about the products and services they might wish to purchase. It is thus "the State's interest in regulating the underlying transaction" that "give[s] it a concomitant interest in the expression itself" (*Edenfield*, 507 U.S. at 767) and the power to "deal effectively with false, deceptive, or misleading sales techniques" (*Bolger*, 463 U.S at 69).

The commercial speech doctrine's status as an outgrowth of government's nearly plenary authority to regulate commercial transactions has given rise to a "'commonsense distinction'" in this Court's cases "between speech proposing a commercial transaction, *which occurs in an area traditionally subject to government regulation*, and other varieties of speech." *Ohralik* v. *Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978) (emphasis added). "*By definition*," the Court has explained, "commercial speech is linked *inextricably* to commercial activity." *Friedman* v. *Rogers*, 440 U.S. 1, 10 n.9 (1979) (emphasis added). The state's power over the latter carries a "concomitant power" to

containing factual statements on matters such as the use of nuclear power was fully protected as within "'the arena of public discussion'" (447 U.S. at 534), even though the statements could no doubt influence consumers' choices.

regulate the former. *44 Liquormart, Inc.* v. *Rhode Island*, 517 U.S. 484, 499 (1996) (plurality).[7]

This defining linkage is completely absent from California's asserted power to control "commercial speech." The speech targeted for regulation by the ruling below is not tethered to the state's authority to regulate commercial transactions. Although petitioner sells products in California, no resident of that State need have purchased any product manufactured by Nike in Southeast Asia for *Kasky* liability to attach. Nor does the mere fact that petitioner is a commercial entity whose in-state sales are regulated by the State of California strip petitioner's speech of full constitutional protection. Nike's status as a corporate speaker is immaterial, for "[t]he inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual. *First Nat'l Bank of Boston* v. *Bellotti*, 435 U.S. 765, 777 (1978). And "[s]ome of our most valued forms of fully protected speech are uttered for a profit." *Bd. of Trustees* v. *Fox*, 492 U.S. 469, 482 (1989).

Obviously, California could not (*Zschernig* v. *Miller*, 389 U.S. 429 (1968)) assert regulatory authority to influence working conditions in Southeast Asia. Even outside the realm of foreign affairs, a state may not regulate speech in order to advance its policies – such as a desire to improve perceived factory conditions – in other jurisdictions. In *Bigelow* v. *Virginia*, 421 U.S. 809 (1975), for example, Virginia sought impermissibly to invoke a state "interest in regulating what

[7] Compare the way in which state economic regulation may generate a need for jointly funded information services (see *Glickman* v. *Wileman Bros.*, 521 U.S. 457 (1997) (upholding state-coerced funding without First Amendment scrutiny)), while state-coerced funding of generic ads decoupled from substantive economic regulation is subject to strict First Amendment scrutiny (see *United States* v. *United Foods, Inc.*, 533 U.S. 405 (2001) (striking such state-coerced funding down)).

Virginians may hear or read about * * * New York [abortion] services * * * [to] shield[] its citizens from information about activities outside Virginia's borders, activities that Virginia's police powers do not reach." *Id.* at 827-28.

California is accordingly relegated to asserting a purely speech-based regulatory interest in policing all statements of "fact" by a commercial entity about its operations that are "likely to influence California consumers in their commercial decisions." Pet. App. 28a. But the protection afforded to discussion of matters of public importance certainly extends to such statements of "fact." Facts are the bedrock on which judgments about public issues are reached. "Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues 'about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.'" *Bellotti*, 435 U.S. at 776 (quoting *Thornhill* v. *Alabama*, 310 U.S. 88, 101-02 (1940)). A contrary rule would produce "innocuous and abstract discussions" and, because the line between fact and opinion is so hazy, would "so becloud even this with doubt, uncertainty and the risk of penalty" that "freedom of speech * * * [would] be at an end." *Thomas* v. *Collins*, 323 U.S. 516, 536-37 (1945).

Thornhill v. *Alabama*, 310 U.S. 88 (1940), is very much on point. It involved labor picketing that sought "to advise customers and prospective customers" regarding labor conditions "and thereby to induce such customers" to change their purchasing decisions. *Id.* at 99. This Court rejected the view that any such effect on consumers could trigger the state's regulatory authority over speech, reasoning that "*[e]very* expression of opinion on matters that are important has the potentiality of inducing action in the interests of one rather than another group in society." *Id.* at 104 (emphasis added). Although government has ample authority "to set the limits of permissible contest open to industrial combatants," "[i]t does not follow that the State * * * may impair the effective exercise of the right to discuss freely industrial

relations which are matters of public concern." *Id.* Presaging this very case, the Court explained that "[a] contrary conclusion could be used to support abridgement of freedom of speech and of the press concerning almost every matter of importance to society." *Id.* That is particularly true where, as here, government seeks to regulate "nearly every practicable, effective means whereby those interested * * * may enlighten the public." *Id.*[8]

The California Supreme Court seemed principally motivated by a desire "to adequately categorize statements made in the context of a modern, sophisticated public relations campaign intended to increase sales and profits by enhancing the image of a product or of its manufacturer or seller." Pet. App. 20a. But the commercial speech doctrine needs no expansion to accommodate government's legitimate interest in regulating "image campaigns." Many "image *advertisements*" are commercial speech in the classic sense. Nor, as we have noted, may an advertiser circumvent the commercial speech doctrine through the nicety of "link[ing] a product to a current public debate." *Cent. Hudson Gas & Elec. Co.* v. *Pub. Serv. Comm'n*, 447 U.S. 557, 563 n.5 (1980). And the fact that some "image campaigns" fall outside the "commercial speech" category does not render

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[8] The California Supreme Court expressly declined to follow *Thomas* and *Thornhill* on the ground that they had been superseded by "the modern commercial speech doctrine." Pet. App. 24a. But this Court has cited *Thornhill* and *Thomas* favorably more than 125 times, often in leading free speech precedents. In particular, those decisions undergird the recognition of the First Amendment right to speak on matters of public importance, including the right to engage in social protest. *E.g.*, *Meyer* v. *Grant*, 486 U.S. 414, 421 (1988); *Pac. Gas & Elec. Co.* v. *Pub. Utils. Comm'n*, 475 U.S. 1, 8-9 (1986); *FCC* v. *League of Women Voters*, 468 U.S. 364, 381-82 (1984); *Consol. Edison Co.* v. *Pub. Serv. Comm'n*, 447 U.S. 530, 534-35 (1980); *First Nat'l Bank of Boston* v. *Bellotti*, 435 U.S. 765, 783 (1978); *Branzburg* v. *Hayes*, 408 U.S. 665, 705 n.40 (1972); *Time, Inc.* v. *Hill*, 385 U.S. 374, 388 (1967). See generally Pet. for Cert. 18 & nn.5-7.

them altogether immune either from regulation or from the marketplace consequences of whatever misstatements are uncovered.

Nor has a new and more expansive view of government's regulatory authority been shown necessary to protect consumers, given how readily matters of public importance that concern consumers draw media attention. The media and the internet provide innumerable outlets through which the Kaskys of the world may voice their accusations – accusations to which corporations already feel pressure to respond. And those responses do not go unexamined. When they are revealed in the press to be false or misleading, those responsible are likely to suffer not just embarrassment but substantial losses in sales. That prospect, in turn, gives companies a powerful incentive to ensure that they speak accurately. The proper operations of the marketplace of ideas and the marketplace of goods are thus mutually reinforcing.[9]

The fact that the California Supreme Court eschewed the required nexus between government's regulation of commerce and its power to regulate commercial speech gives rise to a further constitutional infirmity that itself requires reversal. Traditional governmental regulation of commercial advertising applies neutrally to the class of statements on

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[9] The Court can safely leave for another day the question whether special circumstances might justify the state's extension of its authority over commercial speech beyond statements that appear in advertisements or that are otherwise integrally related to an underlying regulated transaction or the consumer qualities of a product. The California Supreme Court did not limit its decision to statements by corporations that require close regulation because they naturally invite exceptional reliance by consumers. In any event, Nike sells athletic apparel, which is not subject to a special regulatory regime in California or any other state. Contrast the securities laws, for example, where government may have a freer hand in regulating financial statements that are immediately incorporated by financial markets into stock prices. *SEC* v. *Wall St. Publ'g Inst.*, 851 F.2d 365 (D.C. Cir. 1988), *cert. denied*, 489 U.S. 1066 (1989).

which consumers directly rely in making purchasing decisions. By contrast, the UCL and FAL apply to commercial sellers but *not* to persons and entities that launch accusations against those sellers – despite the fact that the accusations appear in the identical fora and have an indistinguishable effect on consumer behavior. The government's power "to regulate price advertising in one industry but not in others, because the risk of fraud * * * is in its view greater there" does *not* imply the power to engage in "viewpoint discrimination." *R.A.V.* v. *St. Paul*, 505 U.S. 377, 388-89 (1992). To the contrary, "discrimination between commercial and noncommercial speech" is forbidden as a form of viewpoint-based censorship when, as in this case, "the distinction bears no relationship *whatsoever* to the particular interests that the [government] has asserted." *City of Cincinnati* v. *Discovery Network*, 507 U.S. 410, 424 & n.20 (1993). That rule respects the basic First Amendment principle that "[t]here is an 'equality of status in the field of ideas,' and government must afford all points of view an equal opportunity to be heard." *Police Dep't of Chicago* v. *Mosley*, 408 U.S. 92, 96 (1972).

3. California's Effort To Ensure The Integrity Of The Moral Judgments Of Its Consumers Is Not Directed At "Commercial Harms" As Required By This Court's Precedents.

California's legal regime conflicts with this Court's commercial speech precedents for the further reason that it does not seek to prevent or redress "commercial harms" (*Discovery Network, Inc.*, 507 U.S. at 426) within the meaning of this Court's decisions. There is no suggestion that consumers received Nike products of lesser quality or at a higher price than they bargained for, much less that they bought Nike products that were in any respect defective or dangerous; indeed, none of the statements on the basis of which the court below has held petitioner liable to suit even addressed such matters. The court's theory was instead that

all Nike statements about itself capable of influencing consumers' moral judgments might affect their purchasing decisions and are accordingly fair game for the litigation mill.

If the asserted tie-in between a state's regulatory power and the moral conclusions of consumers ever suffices to convert discussion of public issues into lesser protected "commercial speech," that can only be in the context of direct product advertising and product labels, which are least likely to generate reasoned discussion and which are targeted at consumers and affect purchasing decisions in the first instance and shape broader moral judgments only secondarily. In those limited circumstances, regulation by the state might seek to prevent "false, deceptive, or misleading sales techniques" (*Bolger* v. *Youngs Drug Prods. Corp.*, 463 U.S 60, 69 (1983)). But speech of the sort at issue in this case shapes moral conclusions in the first instance and affects purchasing choices only secondarily, if at all. There is only the most attenuated link between public statements on important social, political, and moral issues – which generate heated responses and debate – and consumer purchasing decisions. When the plaintiff's theory depends on fundamentally moral judgments made on the basis of such public debate, the link to the government's regulatory authority required by the commercial speech doctrine is broken.

* * * *

For the foregoing reasons, the judgment below must be reversed because petitioner's statements cannot be deemed "commercial speech" by reference either to the definitions articulated by this Court or to the doctrine's underpinnings. Respondent has definitively conceded that his suit must be dismissed if petitioner's speech is properly characterized as anything other than *false or misleading commercial speech.* As petitioner now shows, the judgment must also be reversed because, whether or not petitioner's speech is deemed

"commercial," the scheme of regulation approved by the California Supreme Court violates the First Amendment.

II. Even As Applied To Speech Properly Deemed "Commercial," The Legal Regime The California Supreme Court Constructed In This Case Stifles Speech In Violation Of The First Amendment.

The California Supreme Court brought its First Amendment inquiry to a close once it concluded that petitioner's statements were all properly characterized as "commercial speech." The court deemed state regulation targeted at "commercial speech that is false or misleading" to be immune from constitutional challenge on the theory that such speech is, by definition, "not entitled to First Amendment protection and 'may be prohibited entirely'" (Pet. App. 10a (quoting *In re R.M.J.*, 455 U.S. 191, 203 (1982))), with the asserted consequence that the speech regulated by the UCL and FAL "receives *no protection* under the First Amendment, and therefore a law that prohibits only such unprotected speech *cannot violate constitutional free speech provisions*" (*id.* 27a (emphases added)). That is a massive *non sequitur*: It skips entirely over the vital question whether the *means* government employs in its campaign to eliminate false commercial statements sacrifice too much truthful, and thus protected, speech to withstand First Amendment scrutiny. As this Court said in a related context, "Such a simplistic, all-or-nothing approach to First Amendment protection is at odds with common sense and with our jurisprudence as well." *R.A.V.* v. *St. Paul*, 505 U.S. 377, 384 (1992).

"Regardless of the particular label asserted by the State – whether it calls speech * * * 'commercial' or 'commercial advertising' or 'solicitation' – a court may not escape the task of assessing the First Amendment interest at stake and weighing it against the public interest allegedly served by the regulation." *Bigelow* v. *Virginia*, 421 U.S. 809, 826 (1975). When, as with UCL and FAL suits like Kasky's,

government's attempt to regulate assertedly false speech on matters of public importance would chill much communication that is truthful and fully protected by any measure, the First Amendment imposes on the plaintiff the heightened burdens of proving injury; of establishing by clear and convincing evidence that the defendant spoke with at least reckless indifference to the truth; and of showing that the state's scheme is not skewed against a set of speakers or of views – burdens Kasky cannot satisfy.

A. The Decision Below Will Inevitably Limit Expression By Commercial Entities Throughout The World, Which Rightly Fear Being Subjected To Wholly Unpredictable And Potentially Crushing Suits.

The California Supreme Court's ruling in this case reflects that court's commitment to construe the already broad terms of the UCL and FAL as expansively as possible in order to "effectuate the [statutes'] full deterrent force." *Fletcher* v. *Sec. Pac. Nat'l Bank*, 591 P.2d 51, 57 (Cal. 1979). That "deterrence" rationale is shorthand for a policy of making commercial actors reticent to speak until they are virtually certain that all their remarks will in hindsight be found truthful – indeed, that they will on their face be so far beyond dispute that any suit asserting the contrary would be immediately dismissed as spurious – manifestly an inordinately difficult standard to meet in the context of an ongoing public debate. Although nominally directed only at "false" and "misleading" statements, such a broad prophylaxis, this Court has repeatedly held, inevitably tends to "chill" truthful expression, for "[p]unishment of error runs the risk of inducing a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press." *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 340 (1974).

The chilling effect of the legal regime approved by the court below is fact, not hypothesis or prediction. Nike has determined on the basis of this suit that the very real prospect

that a California resident will take it upon him or herself to dispute the veracity of one of the company's statements in a California court requires petitioner to restrict severely all of its communications on social issues that could reach California consumers, including speech in national and international media. Among other things, petitioner has prepared an annual Corporate Responsibility Report – the company's single most important document describing its initiatives and progress on matters such as labor compliance, community affairs, sustainable development, and workplace programs, and a document that is widely used as a model by other corporations – but recognizes that the company's critics would inevitably seize upon the opportunity to force it to defend every statement in the report in court, notwithstanding the enormous media scrutiny to which all those statements will already be subject. Because the UCL and FAL apply to *all* statements received in California, including those reaching it through the internet, Nike cannot place a cone of silence over that one State but must instead refrain from releasing its report *anywhere in the world.* Nike also declined to participate this year in the *Dow Jones Sustainability Index*, an important worldwide measure of corporate responsibility practices, and in the months since the California Supreme Court decided this case, it has felt obliged to decline dozens of invitations (most of them outside California) to speak on corporate responsibility issues that it had openly addressed in years past and that it would continue to discuss now were it not for the imminent prospect of inviting still further costly litigation under the *Kasky* regime – a prospect that clouds a corporation's discussion of virtually any topic somehow related to its business practices that might conceivably matter to citizens as consumers, including (but not limited to) labor conditions, environmental impact, responsible investment and divestment practices, and community involvement, even when the company speaks in the heat of public controversy.

Even beyond the chilling effect on reports long in the making and detailed in the information they provide to the

public, companies are invariably hesitant to react when called on, as Nike has been here, to make on-the-spot responses to accusations – in this case, accusations about the more than half-million individuals employed not by it but by its subcontractors halfway around the world. Those responses will predictably be chilled first by delay while the speaker seeks to verify all the facts, and then by silence inasmuch as *no* degree of effort suffices to protect the speaker from the strict liability of California law. The application of the UCL and FAL authoritatively approved in this case thus extends California's assertion of authority well beyond its regulation of traditional advertising – advertising that, because statements about qualities of the "product and its price" are subject to ready verification *ex ante* and because advertising is generally prepared not on short notice but well in advance of publication, is less likely to be chilled. *Rubin* v. *Coors Brewing Co.*, 514 U.S. 476, 495 (1995) (Stevens, J., concurring) (quoting *Va. Pharmacy Bd.*, 425 U.S. at 777-78 (Stewart, J., concurring)).

For similar reasons, the California legal regime – by reaching speech *in any format and in any forum*, so long as it is received in California – is far more likely to inhibit truthful communication than is regulation of speech relating to specifically identified matters that are entirely within the corporation's control, such as a label stating that a specific product is "Made in the U.S.A." Indeed, the majority below went so far as to hold that the First Amendment does not protect even statements made to "persons (such as *reporters* or *reviewers*) [who are] likely to *repeat* the message to or otherwise influence actual buyers or customers." Pet. App. 18a (emphases added). Unable to know *ex ante* whether a press account will carry remarks accurately or completely, a corporation would be foolish to continue to provide information freely to the media. Kasky's suit against Oregon-based Nike over statements made to *The New York Times* regarding commercial production in Southeast Asia is obviously just the beginning, for the decision below applies

equally to statements by European and Asian manufacturers carried in *The Economist*, *The Asian Wall Street Journal*, and *The International Herald Tribune*. To leave standing a ruling permitting a state to "exert the power sought here over a wide variety of national publications or interstate newspapers carrying [speech] * * * would impair, perhaps severely, the[] proper functioning" of the press and the free exchange of ideas. *Bigelow* v. *Virginia*, 421 U.S. 809, 828-29 (1975).

Kasky liability also attaches to entirely truthful communications that, although making a valuable contribution to public understanding and discussion, have less value to a corporate speaker's bottom line than the nuisance cost of litigating the issue in the California courts at the insistence of any single dubious resident of that state. A corporation faced with the prospect of *post hoc* strict liability in an uncertain but potentially staggering amount can forgo, or at the least substantially limit, speech on broader social and moral issues. Expression on matters of corporate responsibility in particular has a much more tenuous connection to a corporation's economic success than its commercial "*advertising*," which "is the *sine qua non* of commercial profits" and therefore bears "little likelihood of its being chilled by proper regulation and foregone entirely." *Va. Pharmacy Bd.*, 425 U.S. at 772 n.24 (emphasis added).

The profound reticence to speak on social, political, and moral issues that the *Kasky* regime instills in commercial entities is greatly magnified by the fact that statements made in the course of public controversies may be condemned as misleading, and thus actionable under the UCL and FAL, simply because they allegedly "omit" any of an entirely indeterminate range of supposed "facts." *E.g.*, *Cortez* v. *Purolator Air Filtration Prods. Co.*, 23 Cal. 4th 163, 169 (Cal. 2000); *Comm. on Children's Television, Inc.* v. *Gen. Foods Corp.*, 35 Cal. 3d 197, 213 (Cal. 1983). A commercial advertisement might reasonably be deemed misleading by omission without chilling much valuable speech when that advertisement, for example, fails to disclose a material term

of a commercial offer for sale. But California law as applied in this very different circumstance permits respondent to argue that, when Nike made even the most generalized and literally truthful statements that the company seeks to ensure safe working conditions at contract facilities, its failure to disclose simultaneously that a report in December 1996 found that some workers had been exposed to unsafe conditions at the Tae Kwang Vina Industrial Ltd. Co. plant in Bien Hoa City, Vietnam was actionable. See Compl. ¶ 58(b). It is literally *impossible* for a company to engage in public communication about itself on matters of social importance with any confidence that the population of California will be satisfied that the company's disclosures are entirely truthful and complete. "Even when advertising communicates only an incomplete version of the relevant facts, the First Amendment presumes that some accurate information is better than no information at all." *Central Hudson*, 447 U.S. at 562.

A commercial entity cannot retreat from the statements of fact formally encompassed by the UCL and FAL to the most banal statements of pure opinion that even the California Supreme Court acknowledged were fully protected by the First Amendment. If government may restrain statements of fact and thereby reduce public discourse "to innocuous and abstract discussion" about social issues, "freedom of speech will be at an end." *Thomas* v. *Collins*, 323 U.S. 516, 536-37 (1945). Indeed, because "expressions of 'opinion' may often *imply* an assertion of objective fact" – a truism that has caused this Court squarely to reject such an "artificial dichotomy" (*Milkovich* v. *Lorain Journal Co.*, 497 U.S. 1, 18-19 (1990) (emphasis added)) – a company operating under the pall of *Kasky* liability simply cannot express its "opinion" in any way that will actually communicate valuable information without constant concern about being haled into a California court and held liable for an incalculable amount.

In this case, for example, for petitioner to answer effectively the claim that "Nike exemplifies the harms of globalization because it underpays workers," it must do more

than sing paeans of praise to globalization in general, for such praise would fail to address – and would by many be taken to concede – the basic moral and political assertion inherent in the criticism – *viz.*, that globalization is harmful or even evil *because* it is accompanied by commercial exploitation *of the sort allegedly exemplified by Nike*. The California court's otherworldly observation that "*[n]o law required* Nike to combine factual representations about its own labor practices with expressions of opinion about economic globalization" (Pet. App. 26a (emphasis added)), offers scant comfort because, on any realistic assessment, Nike was obviously under every "*practical* compulsion" to do so (contra *id.* (emphasis added)). When even purely commercial speech is thus "inextricably intertwined" with noncommercial speech on matters of public concern, "the entirety" of the speech must "be classified as noncommercial." *Fox*, 492 U.S. at 474; see also, *e.g.*, *Riley* v. *Nat'l Fed'n of the Blind*, 487 U.S. 781, 796 (1988).

B. Because California's Legal Regime Will Predictably Chill Much Protected Speech, This Is An *A Fortiori* Case For The Application Of The "Actual Malice" Standard.

Measures that impose liability on or otherwise censure speech on matters of public concern – in contrast to statements of purely private interest and to the publication of traditional advertising – are subject to heightened standards of proof under the First Amendment. Compare *Time, Inc.* v. *Hill*, 385 U.S. 374 (1967) (speech on matters of public importance) and *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974) (matter of public importance but private-figure plaintiff) with *Dun & Bradstreet, Inc.* v. *Greenmoss Builders, Inc.*, 472 U.S. 749 (1985) (purely private matters). Those more stringent standards have not been reduced to the role of defenses to defamation suits alone, but apply to governmental action that, although formally restricting only falsehoods, creates a substantial prospect of chilling truthful expression.

E.g., *Time, Inc.* v. *Hill* (claim for depiction in heroic false light); *Pickering* v. *Bd. of Educ.*, 391 U.S. 563 (1968) (dismissal of public employee).

1. *Failure to Require Proof of Reckless Disregard for the Truth.* Wholly apart from the unique features of the UCL and FAL that profoundly inhibit protected speech discussed in Part II-A, *supra*, these causes of action violate the First Amendment because they would impose strict liability, or at least liability based on mere negligence, for misstatements on matters of public concern. California law thus eliminates the ability of any company whose voice reaches that State to speak on social issues with confidence that, if it is found in hindsight to have erred, it will be able to avoid liability upon proving that it made its best efforts to speak accurately. This Court, however, has rightly recognized that "erroneous statement is inevitable in free debate," and therefore "must be protected if the freedoms of expression are to have the 'breathing space' that they 'need * * * to survive.'" *Sullivan*, 376 U.S. at 271-72. "[T]o insure the ascertainment and publication of the truth about public affairs, it is essential that the First Amendment protect some erroneous publications as well as true ones." *St. Amant* v. *Thompson*, 390 U.S. 727, 732 (1968). Because even a negligence standard is "a most elusive standard, especially when the content of the speech itself affords no warning of prospective harm to another through falsity," and thus creates an unacceptably great risk that truthful communication will be restrained for fear of liability, the First Amendment precludes the use of litigation to attack speech without having to prove clearly and convincingly that the speaker acted with at least reckless disregard for the truth (*Time, Inc.*, 385 U.S. at 389), a standard that California law does not impose and that Kasky does not contend he can satisfy.

2. *Failure to Limit Relief to Individuals Personally Pursuing the Prevention or Redress of Actual Injury.* The UCL and FAL conflict just as profoundly with the First Amendment for the independent reason that they empower

any citizen, acting in the self-assumed role of The (Private) Attorney General of California, to compel a speaker to defend against a lawsuit that would yield an order requiring the speaker to pay "restitution," to conduct a court-supervised campaign of "corrective speech," and broadly to desist from speaking in the future on important public issues in a manner that could be characterized as misleading, even if only by omission. Nor is it an answer that Kasky brings this action on behalf of other California consumers, for *they* need not have suffered any injury either. The California Supreme Court has deemed the UCL's statutory purpose to "deter" misstatements to be *so* important that courts may "order restitution without individualized proof of deception, reliance, and injury." *Bank of the West* v. *Superior Ct.*, 2 Cal. 4th 1254, 1267 (1992).

Every resident of California thus has the right to sue any corporation that happens to sell any product or service in that State to dispute the accuracy of any statement regarding that corporation's activities anywhere in the world. Kasky, for instance, alleges no injury and concedes he knows nothing about the facts but serves as plaintiff without bearing any costs under a standard contingent-fee arrangement with his lawyers. Provisions like these vastly increase the litigation exposure of any corporation or other entity that speaks (however indirectly) to California audiences and therefore create a marked inhibition to speech on matters of public concern.

A State's power to organize itself through whatever scheme of separation of powers it wishes (*Highland Farms Dairy, Inc.* v. *Agnew*, 300 U.S. 608, 612 (1937) (per Cardozo, J.); *Dreyer* v. *Illinois*, 187 U.S. 71, 84 (1902)) does not confer the further authority to invest all of its citizens with a free-floating power to police speech in the name of the government. Cf. *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58 (1963) (invalidating "informal censorship" by a roving commission). The First Amendment instead requires that the private plaintiff in such a suit be compelled to prove actual injury – *i.e.*, "evidence of actual loss" and "proof that such

harm actually occurred" – without which the governmental interest advanced by imposing liability is insufficiently weighty to risk chilling valuable expression. *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 349 (1974).

The entirely ethereal governmental interest supposedly furthered by the application of the UCL and FAL to statements of public importance – broadly ensuring that the public maintains an accurate sense of the speaker's moral worth (see *supra* Part I-B) – is no substitute for proof of actual harm as a method of taming the *in terrorem* effect of threatened litigation, and only a requirement of such proof can assure the offsetting existence of a truly significant governmental interest such as that in protecting the plaintiff's personal integrity and reputation. There is no such direct link between an injured party and the statements that the California Supreme Court held in this case could render a speaker liable – statements that affect consumer behavior only indirectly and for only a subset of listeners. [10]

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[10] Indeed, California's unfair trade practice and false advertising law is foreign to "the long accepted practices of the American people." *44 Liquormart, Inc.* v. *Rhode Island*, 517 U.S. 484, 517 (1996) (Scalia, J., concurring). See Dee Pridgen, *Consumer Protection and the Law* 1-1 (2002) ("consumer protection law is actually a legal reform effort [repairing] traditional legal doctrine"). According to "state legislative practices prevalent at the time the First Amendment was adopted" (*44 Liquormart*, 517 U.S. at 517 (Scalia, J., concurring)), restrictions on trade practices applied only to market transactions of goods and services and imposed a very limited variety of penalties for non-compliance. See, *e.g.*, 1791 Ga. Laws No. 457 (regulation of tavern rates imposing forfeiture of excess profits plus two pounds for every offense); 1789 S.C. Acts No. 1574 (regulation of tobacco inspections imposing fines of 10 shillings per shilling of improper "fee, gift, or gratuity"); 1787 Mass. Acts M.10 (quantity and packing regulation of "the Assize of Barrel Beef and Pork" imposing penalties of forfeiture and pounds of "*three pounds*" per offense); 1787 N.C. Sess. Laws ch. X (tavern licensing regulation imposing fines of "fifty Pounds for every Offence"); II Del. Laws ch. CXXI.b. (1785) (zoning regulation of "public marts or fairs" imposing fines "of Ten Pounds" for "selling

Even if a trier of fact could determine what effect the hundreds of articles discussing labor conditions at Nike contract factories in Southeast Asia had on the consuming public, it is telling that California authorizes the conduct of litigation by, and the potential award of open-ended relief in the name of, a person who concedes that he was entirely unaffected by those statements and has no personal

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of strong liquors"); 1784 Conn. Acts (tavern licensing regulation imposing fines of 40 shillings per offense); 1783 N.J. Laws ch. CCCLXXXIII (licensing regulation for doctors imposing a fine of "*Twelve Pounds*" for unlicensed drug sales); 1783 Va. Acts ch. X (consolidating regulations of tobacco inspections imposing forfeiture of unlawful profits plus two shillings for every pound of tobacco unlawfully traded); 1781 Pa. Laws ch. CCI (stiffening bread inspection laws and imposing fines of "one shilling and six pence" for every non-compliant barrel of flour); 1780 Md. Laws ch. XXIV, § XI (trade regulation imposing fines of "hundred pounds of tobacco" for unlicensed liquor sales); 1780 N.Y. Laws ch. XLIII (price control regulation for various "domestic Produce" imposing treble fines per offense); Act for Regulating Taverns, &c. (1778), *reprinted in The First Laws of the State of New Hampshire* 142-44 (John D. Cushing ed., 1981) (quantity regulation of tavern liquor sales imposing fines "of *Ten Pounds*" per offense).

Nor did the landscape of consumer protection shift appreciably with "the state legislative practices at the time the Fourteenth Amendment was adopted" (*44 Liquormart*, 517 U.S. at 517 (Scalia, J., concurring)), a period in which the states generally relied on the common law doctrine of *caveat emptor*. See Jonathan Sheldon & Carolyn L. Carter, *Unfair and Deceptive Acts and Practices* 1 n.3 (5th ed. 2001) ("Notions of the sanctity of contracts and *caveat emptor* • • • only reached full development in the 19th century"); Morton J. Horwitz, *The Historical Foundation of Modern Contract Law*, 87 Harv. L. Rev. 917, 945 (1974) (noting the "rapid adoption of the doctrine" in America beginning in 1804). Indeed, the first state consumer protection statute did not even appear until 1921, joined by just one more before 1960. See Pridgen, *supra*, at App. 3A-2 (indicating the dates of enactment for all state consumer protection statutes). The first form of American advertising regulation likewise did not appear until 1872, four years after ratification of the Fourteenth Amendment. Dean K. Fueroghne, *Law & Advertising* 2 (1995).

knowledge of their truth. A legal scheme permitting bystanders to sue or not as they see fit cannot be assumed to directly advance an important governmental interest. Any suggestion that suits pursued by these optional private attorney generals without any allegation of injury advance an established and important governmental interest is belied both by the fact that no other state or the federal government has adopted a remotely similar legal regime (see generally Cert. *Amicus* Br. of Cal. Civil J. Ass'n & App.) and by the state's evident willingness to allow all of the speech at issue, even if false, to go unredressed should no citizen choose to pursue the matter on the public's supposed behalf.[11]

The private attorney general provisions of the UCL and FAL thus violate the First Amendment because they omit not only any requirement that the plaintiff have suffered harm, but also any *other* meaningful constraint on the ability of private plaintiffs to bring lawsuits that have the potential to impose crushing financial costs upon the defendant-speaker, whether through an order of restitution or through the "burden and expense of litigating" a meritless or marginal claim – which can, without more, "unduly impinge on the exercise of the constitutional right" of free speech, ultimately making the dissemination of truthful information "the loser." *First Nat'l Bank* v. *Bellotti*, 435 U.S. 765, 786 n.21 (1978) (citation and alteration omitted).

There is a significant First Amendment distinction between private suits under the UCL and FAL and superficially similar actions brought by the government. When a regulatory agency is charged with administering a statutory scheme under political and budgetary constraints, there is at least some prospect that enforcement will be

[11] Even on the most expansive view of a private attorney general's ability to secure prospective relief absent proof of personal harm, Kasky's suit must fail. Respondent does not contend that any of the statements at issue in this case are now, or were at the time he filed suit, being published on an ongoing basis.

restrained by the agency's obligation to advance a coherent regulatory mission and to respect the constitutional rights of the regulated parties.[12] To be sure, even if it is "the government [that] intervenes to prevent speech on the basis that it is false, without more, there are reasons to fear that the government acts out of bias or in an effort to repress minorities." Steven Shiffrin, *The First Amendment and Economic Regulation: Away From a General Theory of the First Amendment*, 78 N.W. U. L. Rev. 1212, 1262 (1984). But the prospect of such ideologically driven stifling of speech is enhanced immeasurably when private parties who have suffered no provable injury are invested with the roving power to bring suits challenging speech on matters of public concern. Cf. *Terminiello* v. *Chicago*, 337 U.S. 1, 3 (1949) (law void on its face if it punishes speech that "stirs the public to anger [or] invites dispute"); Zachariah Chaffe, *Free Speech in the United States* 245 (1948) (government must protect speakers from hostile audience reaction).

There is therefore an irreconcilable conflict between (a) a statutory regime that seeks to *prophylactically prohibit* supposed misstatements on matters of public concern in order to protect consumers by vesting broad authority to bring suits in every state citizen who is motivated to assume the mantle of private attorney general, and (b) the settled body of First Amendment law that *prophylactically protects* the very same misstatements in order to ensure that protected speech is not inhibited by fear of just such lawsuits. The Constitution cannot countenance giving a judge or any other official of

[12] Entirely separate issues would therefore be presented by a legal regime empowering a publicly accountable government agency to determine that a particular false statement would threaten harm to the persons it would deceive and should therefore be restrained by a suitably narrow order upon proof of falsity and likely harm. *E.g.*, *Nat'l Comm'n on Egg Nutrition* v. *FTC*, 570 F.2d 157 (CA7 1977). The *Kasky* scheme embodied in the UCL and FAL bears no resemblance to such a regime.

government a free-standing power to rule as Grand Arbiter of Truth, a power readily distinguishable from that of adjudicating truth or falsity when demonstrably necessary to prevent a palpable personal injury such as fraud or defamation. For law is a great teacher, and the lesson taught by the state's gratuitous assumption of that awesome power must be how superfluous it is for individuals to participate vigorously in public debate and to evaluate for themselves the statements of others: the promise that an *official* truth may be obtained through citizen-initiated litigation threatens to reduce the informal process of public controversy that the First Amendment thus far has been understood to embrace at its core to little more than a dress rehearsal.

Perversely, the discovery of truth will be the loser. For the "best test of truth is the power of the thought to get itself accepted in the competition of the market * * *." *Consol. Edison Co.* v. *Pub. Serv. Comm'n*, 447 U.S. 530, 534 (1980) (quoting *Whitney* v. *California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring); *Abrams* v. *United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)). That is why a core "purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion." *Riley* v. *Nat'l Fed'n of the Blind*, 487 U.S. 781, 791 (1988) (quoting *Thomas* v. *Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring))). In the classic words of Judge Learned Hand (*United States* v. *Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)), the First Amendment "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all."

CONCLUSION

For the foregoing reasons, the judgment of the California Supreme Court should be reversed.

Respectfully submitted,

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